United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Jule Kc Dravery
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10:30 am
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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,710

209

PACIFIC FM, INCORPORATED,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MARIN BROADCASTING CO., INC.,

Intervenor.

APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 19 1966

Nathan J. Paulson
CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PACIFIC FM, INCORPORATED
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

Case No. 19,170

PREHEARING STIPULATION

I. Appellant believes the following issue is presented in the above entitled case:

> Whether the action of the Commission in granting the KTIM-FM application without a hearing, and denying Appellant's request that the application be set for hearing, constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act of 1934, as amended.

II. Appellee and Intervenor believe the following issue is presented in the above entitled case:

> Whether the action of the Commission in setting aside its previous grant of the KTIM-FM application, regranting the application effective December 2, 1965, and denying appellant's request for a hearing constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act.

III. Counsel for the Commission and the Intervenor reserve the right to argue that the appeal should be dismissed on the grounds that appellant lacks standing and that the order being appealed from is not otherwise properly reviewable.

IV. The counsel for the parties further stipulate and agree that the joint appendix will be filed within ten days after the time for the filing of a reply brief. References to the record appearing in the briefs of the parties will be to the page numbers of the record as certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

V. The cost of printing the Joint Appendix, including the material included upon the designation by the Appellee (F.C.C.) provided such designated material is relevant to the issues, will be borne by the Appellant.

November 15, 1965

Respectfully submitted,

/s/ Ronald A. Siegel
Counsel for Appellee,
Federal Communications Commission

/s/ Robert L. Heald
Counsel for Appellant
Pacific FM, Incorporated

/s/ Robert M. Booth, Jr.
Counsel for Intervenor
Marin Broadcasting Co., Inc.

[Filed 11/24/65]

Before: Fahy, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, except as hereinafter provided, and it is

ORDERED that the joint appendix of the parties shall be filed on or before the date on which petitioner's reply brief is due to be filed; the stipulation shall control further proceedings in this case unless modified by further order of this court, and the stipulation and this order shall be printed in the joint appendix herein.

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[17]

[Rec'd June 2, 1965]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Application of

MARIN BROADCASTING CO., INC. (KTIM-FM)
San Rafael, California

File No. BPH-4860

For Construction Permit to Increase
Power and Antenna Height

PETITION FOR RECONSIDERATION

Comes now Pacific FM, Incorporated, licensee of FM Broadcast Station KPEN, San Francisco, California, and respectfully requests the Commission to reconsider its action, published May 3, 1965, granting without hearing the above-described application. In support whereof Petitioner states as follows:

1. Petitioner operates its Station KPEN on 101.3 Mc (Channel 267) in San Francisco, California. KTIM-FM, on 100.9 Mc (Channel 265), heretofore operated with effective radiated power to 870 watts would, under the above noted grant, increase its antenna height and power to an effective radiated power of 3000 watts.

2. The mileage separation between these stations is 20.8 miles, only slightly more than one-half the minimum separation set by Section 73.207 of the Commission's rules

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for stations two channels removed. Hence, even on a theoretical basis, interference within KPEN's 1 mv/m contour is recognized, and shown by the KTIM-FM application and Figure 1 of Section 73.333.

This interference will be increased by the grant of BPH-4860. Moreover, the interference will be much more severe than that theoretically indicated, as shown by the attached engineering affidavit of Consulting Radio Engineer, Edward Edison, incorporated herein and made a part hereof. Accordingly, Petitioner has been injured by the Commission's action in granting the said application, and is a party aggrieved whose interests have been adversely affected within the meaning of Section 405 of the Communications Act of 1934, as amended. Moreover, Petitioner's right to file this Petition for Reconsideration is covered by Court of Appeals Decision of May 7, 1965, No. 18738, Citizens TV Protest Committee and Clarksburg Publishing Company v. Federal Communications Commission. Furthermore, the Commission itself, in its Fourth Report and Order in Docket 14185, recognized that there would be cases such as this, but stated it would resolve them on a case to case basis.

3. The rationale in the Fourth Report and Order for allowing short-spaced Class A stations to go up in power included (1) need to increase power to serve the station's community; (2) that the increased interference would be slight and (3) administrative convenience. In the present case the offending station is approximately one-half the distance from

[19]

KPEN which the Commission's rules provide, constituting a clear conclusion that even the presence of the assignment at this distance is unsound. No need has been shown in the KTIM-FM application for more power to serve its community, which is San Rafael. In addition, the increase in interference cannot be assumed to be slight. The Commission itself knows that the terrain in Marin County is extremely rough, and that the "smooth earth" conditions which underlie its theoretical criteria are inapplicable. The attached engineering statement shows the terrain profiles crossing Mt. Tamalpais (where there is no popu-

lation served) are not typical, and their inclusion results in distortion which erroneously raises the overall height of average terrain — with the resulting excessive height, the power allowable should be only 620 watts instead of 3000 watts. The effects of this distortion are further intensified by the unfavorable terrain intervening between KTIM-FM and KPEN. This is not in any way a normal, or average, situation, but the very opposite. Spot measurements, made under the direction of James J. Gabbert, Chief Engineer of Petitioner, showed KPEN's measured field strengths to average 30 db below the levels predicted by the Commission's FM propagation curves, in Marin communities: Sausalito, Mill Valley, Corte Madera, San Anselmo, San Rafael and Terra Linda. These factors point to the need to make a detailed examination of the situation between KTIM-FM and KPEN

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if major harm to the public is to be averted. Certainly, it is not a case in which administrative convenience should be over-riding and the Commission should have, in any event, reconsidered and reviewed the matter, even on its own motion. This is the very kind of case which imperatively calls for individual detailed consideration as a matter of protection of service to the public. It appears that the interference resulting from the KTIM-FM grant will cause destructive interference to KPEN's service in large portions of Marin County, and Petitioner is prepared, in this regard, to make and submit comprehensive measurements, over a considerable period of time, if the Commission will permit it. This area is a part of the San Francisco urban and suburban district, and within the natural and essential scope of KPEN's service and obligations.

WHEREFORE, it is respectfully requested that the Commission reconsider its action granting the aforesaid application, and designate it for hearing upon the following issues, making Petitioner a party thereto:

(1) To determine whether KTIM-FM, operating as proposed with effective radiated power of 3 Kw, will cause objectionable interference to Station KPEN, San Francisco, and

(2) To determine, in the light of the foregoing

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issue whether or not the KTIM-FM application should be granted.

Respectfully submitted,

PACIFIC FM, INCORPORATED

By /s/ Lester W. Spillane
San Francisco, California
Its Attorney

June 1, 1965

[22]

[Certificate of Service
June 1, 1965]

[23]

PACIFIC FM, INCORPORATED
SAN FRANCISCO, CALIFORNIA

ENGINEERING STATEMENT OF EDWARD EDISON, CONSULTING RADIO ENGINEER

The firm of Hammett & Edison, Consulting Radio Engineers, has been retained by Pacific FM, Incorporated, licensee of FM Station KPEN, San Francisco, California, to make engineering studies of the allocation and coverage conditions relating to FM Stations KPEN and KTIM-FM. Station KTIM-FM is licensed to operate at San Rafael, California, on the 100.9 mc FM channel which is two channels removed from Station KPEN, 101.3 mc.

Station KTIM-FM was recently granted construction permit BPH-4860 to increase antenna height and power to the maximum permitted for Class A FM stations as set forth in Section 73.211(b) of the FCC Rules. These Rules limit Class A stations to an effective radiated power of 3 kilowatts at a maximum antenna height of 300 feet above average terrain, requiring that effective radiated power must be reduced in accordance with curves contained in Figure 3 of Section 73.333 where antenna heights exceed the 300-foot maximum. The average elevation of the 2-10 mile terrain as shown in the original KTIM-FM application for construction permit is as follows:

Azimuth	Average Elevation of 2-10 Mile Terrain
N 0° E	50 feet
45	20
90	22
130	0
170	185
225	1130
270	790
315	592

It is noted that there are extreme departures from reasonably level terrain, the last three radials tabulated above extending over Mt. Tamalpais or its foothills into essentially uninhabited regions. There is no population served in any of these three radial directions beyond four miles from the KTIM-FM transmitting site. The distant portions of these radials in no way effect propagation conditions in the populated area served by KTIM-FM but they do reduce the effective height of KTIM-FM to an unreasonably low value when based on considerations of 2-10 terrain in eight directions. If the 2-10 mile terrain on the first five radials tabulated above are averaged (these being the only radials typical of terrain in the KTIM-FM service area) the average elevation of the 2-10 mile terrain would be only 55 feet above mean sea level.

The effective height of the KTIM-FM antenna recently authorized is approximately 650 feet msl, so the effective height of KTIM-FM above average terrain typical of its service area is approximately 600 feet. With this excessive height the power permitted by the appropriate curves in Figure 3 of Paragraph 73.333 of the FCC Rules would be 620 watts.

It is noted that the geographic separation between Stations KPEN and KTIM-FM is less than 20.8 miles as scaled from a Local Aeronautical Chart. This is barely half of the forty-mile separation required by Section 73.207 of the

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FCC Rules for 400 kc frequency separation between a Class B and a Class A station. Compounding the interference situation between these stations is the unfavorable terrain between Station KPEN and the numerous Marin County cities on the periphery of the KTIM service area. Field-intensity measurements made by others show that the measured KPEN field intensities in the towns of Sausalito, Mill Valley, Corte Madera, San Anselmo, and San Rafael, average 30 db below that predicted using FCC FM propagation curves and effective heights based on the 2-10 mile terrain from Station KPEN. All of these communities are within the San Francisco-Oakland urbanized area. The resulting interference from any power increase for Station KTIM-FM will, in my opinion, seriously reduce existing KPEN service to a substantial portion of the urbanized area. The height/power limitation for Class A FM channels established at 3 kw and 300 feet can provide tolerable service and interference conditions between Class B and Class A FM stations separated by 400 kilocycles at the minimum mileage separation of 40 miles with reasonably flat terrain. To establish coverage and interference conditions between KTIM-FM and KPEN, more nearly approximating the typical smooth-earth case on which the FCC Rules were promulgated, the effective radiated power of Station KTIM-FM

should be reduced below the presently licensed value of 870 watts rather than increased to 3000 watts.

HAMMETT & EDISON
Consulting Radio Engineers

/s/ Edward Edison

May 28, 1965

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AFFIDAVIT

State of California)
County of San Mateo) ss:

Edward Edison, being first duly sworn upon oath, deposes and says:

1. That he is a qualified registered engineer and a partner in the firm of Hammett & Edison, Consulting Radio Engineers, with offices located near the city of San Francisco, California,

2. That he graduated from the University of Nebraska with a degree of Bachelor of Science in Electrical Engineering in 1942, has completed twelve years of employment by the Radio Corporation of America and its subsidiaries in various engineering, management, and sales capacities, is a Registered Professional Engineer in the State of California, and has been associated with Robert L. Hammett in the practice of consulting engineering since 1955,

3. That the firm of Hammett & Edison, Consulting Radio Engineers, has been retained by Pacific FM, Incorporated, licensee of FM Station KPEN, San Francisco, California, to make engineering studies of the allocation and coverage conditions relating to FM Stations KPEN and KTIM-FM,

4. That he has carried out such engineering work and that the results thereof are attached hereto and form a part of this affidavit,

5. That the foregoing statement and the report of the aforementioned engineering work are true and correct of his own knowledge except such statements made therein on information and belief, and as to such statements, he believes them to be true.

/s/ Edward Edison

Subscribed and sworn to before me this 28th day of May, 1965

/s/ John B. Lewis, Notary Public
In and for the County of San Mateo, State of California
My Commission Expires Aug. 7, 1965
2278 Brittan Ave., San Carlos, Calif.

[26]

[Rec'd June 14, 1965]

OPPOSITION TO PETITION FOR RECONSIDERATION

Marin Broadcasting Co., Inc., licensee of Station KTIM-FM, San Rafael, California, by its attorney, respectfully submits its opposition to a Petition For Reconsideration filed by Pacific FM, Incorporated, licensee of Station KPEN(FM), San Francisco, California, dated June 1, 1965, and requests that said petition be denied.

In support whereof, the following is respectfully submitted.

1. Station KTIM-FM is licensed to operate as a Class A station at San Rafael on the frequency of 100.9 megacycles (Channel 265) with an effective radiated power of 870 watts from an antenna 245 feet above average terrain. Station KPEN is licensed to operate as a Class B station at San Francisco on the frequency of 101.3 megacycles (Channel 267) with an effective radiated power of 46 kilowatts from an antenna 1220 feet above average terrain. The transmitter sites to the two stations are separated by approximately 20.8 miles. The stations have been operating on second adjacent channels since 1961 when Station KTIM-FM was placed in operation.

2. On March 18, 1965, Marin filed the above-entitled application for a construction permit to increase the effective radiated power of Station KTIM-FM to 3 kilowatts, the maximum permissible for Class A stations. The only change in the existing installation proposed was the installation of a new 1 kilowatt transmitter. No changes in the transmitter

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site, antenna or transmission line were proposed. The application was granted by the Commission without a hearing on May 3, 1965.

3. The Petition For Reconsideration does not allege that the operation of Station KTIM-FM with higher power would violate any rule or policy of the Commission. Instead, petitioner merely alleges, in broad, general terms, that Station KPEN presently receives interference from Station KTIM-FM and that the interference would be increased by operation of Station KTIM-FM with higher power. In the engineering statement attached to the petition, the consulting engineer notes that the average elevation above terrain 2 to 10 miles from the transmitter is greater on three radials (225, 270 and 315 degrees) than on the remaining five radials and argues that those three radials should be disregarded because "[t]here is no population served in any of these three radial directions beyond four miles from the KTIM-FM transmitting site".

4. It is respectfully submitted that the Petition For Reconsideration must be denied. The proposed operation fully complies with and satisfies every applicable rule and policy of the Commission. Section 73.213 of the Commission's Rules is controlling when an existing FM station seeks to improve its facilities. Section 73.213(d) provides as follows:

> "Stations will be authorized maximum facilities for their class in those directions in which they are short-spaced to other stations on second or third adjacent channels."

Thus, because Stations KTIM-FM and KPEN operate on second adjacent channels, each may increase power to the maximum permitted by Section 73.211(b) of the Rules. The operation of Station KTIM-FM proposed in the above-entitled application fully satisfies Section 73.213(d). Petitioner does not have standing to seek reconsideration or otherwise object.

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5. As noted above, petitioner alleges that Station KPEN presently receives interference from Station KTIM-FM and that the interference would be increased by operation of Station KTIM-FM with higher power. Significantly, however, petitioner fails to show the location or extent of the interference. This is not surprising, because the rules regulating the location, power and antenna height of FM stations are not based upon no interference conditions and because the rules contain no method of computing interference. In fact, Section 73.213 was adopted with full recognition that some additional interference will be caused to existing stations. Petitioners allegations are insufficient to establish standing to seek reconsideration of the grant of the above-entitled application. Citizens TV Protest Committee v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___, 5 RR 2015 [1965], upon which petitioner relies, clearly is not applicable here.

6. As noted above, petitioner's consulting engineer states that the elevation above average terrain 2 to 10 miles from the transmitter of Station KTIM-FM is greater on three radials (225, 270 and 315 degrees) than on the remaining five radials and argues that those three radials should be disregarded because "[t]here is no population served in any of these three radial directions beyond four miles from the KTIM-FM transmitting site". The profile radials to which petitioner's consulting engineer referred are contained in the engineering statement of Alfred E. Towne, dated October 14, 1960, submitted as part of Marin's original application for a construction permit for a new station, File No.

BPH-3210, which was filed on November 23, 1960, and granted without hearing on January 18, 1961. Examination of Mr. Towne's engineering statement discloses that the profile radials and computations of height above average terrain were made in the manner required by Section 73.313(d) of the Rules. The exclusion of certain profile radials, as urged by petitioner's consulting engineer, is not provided for by any provision

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of the Rules. If the computations of Mr. Towne had not been made in accordance with the Rules, the Commission would not have granted Marin's original application. There is no merit to petitioner's argument.

6. Other unsubstantiated statements appear in the petition and engineering statement, including those concerning measurements which allegedly show that the signal of Station KPEN in certain communities of Marin County ". . . average 30 db below the levels predicted by the Commission's FM propogation curves . . .", and that ". . . the interference resulting from the KTIM-FM grant will cause destructive interference to KPEN's service in large portions of Marin County . . .".

7. A petition for reconsideration must be supported by substantial facts and not vaguely worded allegations. It is respectfully submitted that petitioner has failed to show that it has been injured by the grant of the above-entitled application and that it is a party in interest. It follows that the Petition For Reconsideration must be denied.

WHEREFORE, the premises considered, the Commission is respectfully requested to deny the Petition For Reconsideration filed by Pacific FM, Incorporated.

Respectfully submitted,

MARIN BROADCASTING CO., INC.
By /s/ Robert M. Booth, Jr.
Its Attorney

BOOTH & LOVETT
1100 Vermont Avenue, N.W.
Washington, D.C. 20005

June 14, 1965

[30]

[Certificate of Service
June 14, 1965]

[31]

[Rec'd June 24, 1965]

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Pacific FM, Incorporated (KPEN), by its attorney, respectfully replies to KTIM-FM's Opposition to KPEN's Petition for Reconsideration, as follows:

1. As to the argument about standing, Petitioner has made the requisite allegations, and prima facie showing, required by Section 405 of the Communications Act of 1934, as Amended, and Section 1.106 of the Commission's Rules, and no further citation of authority is necessary. KTIM-FM's own application, of which official notice may be taken, acknowledges the actuality of the interference within KPEN's 1 mv/m contour. Moreover, the petition is supported by the engineering affidavit of qualified engineers concerning the claim of electrical interference, as called for by Section 1.106 (e), and no controverting engineering opinion has been offered. The Commission has also expressly recognized the standing, and rights of per-

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sons affected, to object in cases such as this (See Para. 36 of Fourth Report and Order in Docket 14185).

2. The Opposition errs in its Paragraphs 3 and 4, and in its conclusion in Paragraph 7 by ignoring the reality that existing rules and standards do not actually deal with or cover such operations. KTIM-FM is an anachronism, which does not come near meeting the separations called for by the rules (about half way), and was suffered because it was in existence at the time the rules were adopted. The general

provision for increase in facilities by short-spaced stations was manifestly one of administrative convenience and, as to this, the opposition also pointedly ignores Paragraph 36 of the Fourth Report (3 RR 2nd, 1571) in which the Commission recognized the incidence of situations involving interference within 1 mv/m contours, and that it would consider and resolve them on a case-to-case basis.

Respectfully submitted,

PACIFIC FM, Incorporated

By /s/ Lester W. Spillane
San Francisco, Calif.
Its Attorney

Dated: June 23, 1965.

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[Certificate of Service
June 23, 1965]

[34]

[Released August 31, 1965]

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioners Henry, Chairman; Bartley and Cox absent; Commissioner Hyde concurring insofar as it sets aside the grant).

1. The Commission has before it for consideration (a) the above-captioned application; (b) "Petition For Reconsideration" of the Commission's action of April 30, 1965 granting the application, filed by Pacific FM Incorporated ("Pacific") on June 2, 1965; (c) opposition to the petition, filed by Marin Broadcasting Co., Inc. ("Marin") June 17, 1965, and (d) Pacific's reply filed June 24, 1965.

2. On March 18, 1965 Marin filed the above-captioned application for an increase in Station KTIM-FM's effective radiated power. No

objection was lodged and the application was granted by Chief, Broadcast Bureau on April 30, 1965 purusant to authority delegated by Section 0.281 of the Commission's Rules. Within the thirty day period following the May 3, 1965 public notice of this action, Pacific filed the above petition for reconsideration. Pacific alleges that its San Francisco station, KPEN(FM) (101.3mc, 46kw, 1220 ft.), will receive increased interference within its 1mv/m contour from second adjacent channel station KTIM-FM (100.9mc, 3kw, 245 ft.). This Pacific traces to the fact that the stations are only 20.8 miles apart instead of the 40 miles now required by the rules. Thus, Pacific contends that the decision of the Court of Appeals in Citizens TV Protest Committee et al. v. F.C.C. ___ U.S. App. D.C. ___, ___ F.2d ___, 5 RR 2d 2015 (1965) established its right to file a Petition for Reconsideration and quotes the Fourth Report and Order in the FM rule making proceeding (Docket 14185, FCC 64-919) to the effect that the question of the legal significance to be attached to power increases (otherwise legitimate) which cause 1 mv/m interference was specifically reserved (Paragraph 36). Pacific argues that the interference which results from KTIM-FM's power increase is actually much greater than theoretical computations would indicate. According to Pacific, spot measurements show its signal to be 30 db below the figure indicated by Commission curves. In addition to making this point, in the engineering exhibit attached to the petition it argues that even the theoretical computations are incorrect because Marin has improperly determined KTIM-FM's height above average terrain. Pacific contends that in three of the eight radials the 2-10 mile terrain is so markedly different from that in the other directions that it should have been excluded in determining KTIM-FM's height above average terrain, especially since that area is virtually uninhabited.

3. Marin's opposition contends that the application satisfied every applicable rule and policy of the Commission, that second adjacent channel short-spacing according to the rules, is not an impediment to grant and further that the new rules are not phrased in terms of interference and contain no method for its computation. Marin also disputes Pacific's argument about use of certain radials, contending that the height was computed in accordance with Section 73.313(d) of the Commission's Rules and that exclusion of radials is nowhere called for by any Commission rule. In sum, Marin finds the petition insubstantial and vaguely worded, and disputes Pacific's contention that Citizens TV Protest Committee, supra, confers standing. Thus, it argues, Pacific has failed to establish a cognizable injury and its petition should be denied.

4. Pacific in its reply, contends that a prima facie showing has been made, that no further citation of authority is necessary and that Marin has not denied the existence of increased 1 mv/m interference and that the Commission has specifically recognized that situations of this sort would arise and reserved judgment in the rule making proceeding until that time.

5. In the Fourth Report and Order in the FM Rule Making Proceeding, the Commission concluded that the public interest would be served by permitting short-spaced Class A stations to obtain maximum facilities without regard to short-spacing to any except other co-channel Class A stations (see paragraphs 26-28). Thus, under the new rules, the second adjacent channel shortage to KPEN(FM) would not prevent KTIM-FM from obtaining maximum facilities. Nevertheless, in amending the rules, the Commission recognized that in certain instances such a power increase would cause interference to an existing station within its 1 mv/m contour against which it had been protected under the old rules. Such interference under the old rules constituted a modification of license which could not be authorized without provid-

ing the licensee with written notice and an opportunity to object in a public hearing. In paragraph 36 of the Fourth Report and Order we reserved judgment on the right of an existing licensee to object to such interference. An existing station takes renewal of its license subject to the rules then in effect, and were it not for the statement in paragraph 36, licensees would not be heard to complain of interference against which they no longer were protected since with the change in the rules such interference no longer constituted a modification of license. The Goodwill Stations v. F.C.C. 117 U.S. App. D.C. 64, 325 F.2d 637 (1963); see also Transcontinent Television Corp. v. F.C.C. 113 U.S. App. D.C. 384, 308 F.2d 339 (1962).

6. In this case, however, since Pacific's station has not been renewed since the new rules were adopted, creation of 1 mv/m interference constitutes a modification of its license. Although Pacific did not lodge an objection prior to grant, we do not believe that its failure to do so is a proper basis for denial of the requested relief — Indian River Broadcasting Co. (WIRA) FCC 64-662, 3 RR 2d 295 (1964). Therefore, since Pacific

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would receive additional interference within its 1 mv/m contour, we will set aside our action granting the application. It does not follow, however, that the application must be designated for hearing, but only that a grant of the application could not be effective before the December 1, 1965 expiration of Pacific's license — Goodwill Stations, supra. At that time, Pacific's right to demand a hearing because the application works a modification of its license will no longer exist. But, as indicated by paragraph 36 of the Fourth Report and Order, it was not the Commission's intention to foreclose inquiry into the impact of 1 mv/m interference upon renewal of the interfered-with station's license.

7. The second adjacent channel operations of Marin and Pacific are separated by approximately 20 miles and Pacific's 1 mv/m contour encompasses Marin's site. Therefore, any increase in Marin's facilities inevitably causes increased 1 mv/m interference, but since Marin's signal must be ten times that of Pacific to cause interference, such interference occurs only in the vicinity of Marin's site.[1/] Even operating with maximum Class A facilities of 3 kw at 300 feet, Marin would cause interference to only a small portion of the area within the 1 mv/m contour of Pacific's station which operates with "super-maximum" Class B facilities of 46 kw at 1220 feet. Pacific has disputed the accuracy of theoretical computation made on the basis of the above-listed facilities. On the one hand, Pacific states that spot measurements have shown its signal to be markedly below the level theoretically anticipated and on the other, that Marin's signal extends further than indicated because in determining its height above average terrain it improperly used the atypically high terrain elevations on three radials in determining the average terrain elevation, and thus arrived at an inaccurately low figure for the station's height above average terrain. Even if Pacific had stated when, where and by whom the spot measurements had been made, such measurements are not considered to be an acceptable substitute for theoretical computations based on the prediction method specified in the Commission's Rules. Nor is Pacific on firmer ground in ignoring the requirements of Section 73.313 of the rules in determining Marin's height above average terrain. Although Section 73.313 of the rules recognizes that where terrain elevations along certain radials depart widely from the average elevation along those radials the prediction method may indicate contour distances at variance with those expected in practice, this provision does not provide any basis for ignoring atypical terrain elevations on particular radials, much less atypical radials themselves. In actuality, these variations merely indicate that Marin's contours are not circular. Whether the elevations on the pertinent radials are averaged or

whether they are considered separately, the area involved remains essentially the same size. Moreover, since Marin's site is completely encompassed within Pacific's 1 mv/m contour, the distance to Marin's interfering contour in any particular direction assumes no particular significance, because it affects the location but not the extent of interference.

1/ The effect of such interference is to substitute Marin's signal for Pacific's.

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8. Since the additional area within Pacific's 1 mv/m contour area which will receive interference represents an exceedingly small percentage of the total area within that contour, we do not find that such interference standing by itself poses an impediment to grant. In addition, Pacific has failed to demonstrate any public injury in this area already receiving multiple FM services resulting from the substitution of Marin's signal for Pacific's. Under these circumstances, we conclude that the determination reached in the Fourth Report and Order that the public interest would best be served by permitting Class A stations without co-channel short-spacings to increase power to extend and improve their coverage is applicable here, and that the application should be granted. In order to protect Pacific's "316* rights, we are postponing the effective date of our action granting the application until December 2, 1965, the day following expiration of Pacific's license.

Therefore, IT IS ORDERED, That the Commission's action of April 30, 1965 granting the subject application IS SET ASIDE.

IT IS FURTHER ORDERED, That the application is RE-GRANTED, effective December 2, 1965 subject to the same terms and conditions except that the permit shall specify new dates for commencement and completion of construction of February 2, 1966 and August 2, 1966, respectively.

IT IS FURTHER ORDERED, That the relief requested by Pacific FM Incorporated IS GRANTED to the extent indicated, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Adopted: August 31, 1965

Released: September 2, 1965

[Agency Seal]

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,710

PACIFIC FM, INCORPORATED,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MARIN BROADCASTING CO., INC.,

Intervenor.

APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Of Counsel:

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Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

The Appellant believes the following question is raised by this case:

> Whether the action of the Commission in granting the KTIM-FM application without a hearing, and denying Appellant's request that the application be set for hearing, constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act of 1934, as amended.

The Appellee and Intervenor believe the following question is raised by this case:

> Whether the action of the Commission in setting aside its previous grant of the KTIM-FM application, regranting the application effective December 2, 1965, and denying appellant's request for a hearing constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act.

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Statutes and Regulations (continued)

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* Cases or authorities chiefly relied on.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,710

PACIFIC FM, INCORPORATED,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MARIN BROADCASTING CO., INC.,

Intervenor.

APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case is an appeal from a Memorandum Opinion and Order of the Federal Communications Commission (R. 34-37) adopted on August 31, 1965, and released on September 2, 1965, regranting without hearing the application of Marin Broadcasting Co., Inc., licensee of Station KTIM-FM, San Raphael, California, for a construction permit to increase power, and denying Appellant's request that the application be set for hearing.

This appeal is taken pursuant to the provisions of Section 402 (b) (6) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 USCA 402 (b) (6) (Supp. 1963) and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

On October 9, 1964, the Commission released a Fourth Report and Order in Docket No. 14185, dealing with the Revision of FM Broadcast Rules, particularly as to Allocation and Technical Standards. 3 Pike & Fischer, RR 2d 1571 (1964). Thereafter, on March 18, 1965, Marin Broadcasting Co., Inc. licensee of Station KTIM-FM, filed an application for a construction permit to increase its effective radiated power to 3,000 watts under the new rules adopted in the Fourth Report and Order. (R. 1-12) The application was granted on April 30, 1965. (R. 15) On June 1, 1965, Pacific FM, Incorporated, licensee of FM Station KPEN, filed a Petition for Reconsideration and requested that the Commission set aside the grant of the application and designate it for hearing on the following issues: (R. 17-25)

"(1) To determine whether KTIM-FM, operating as proposed with effective radiated power of 3 kw, will cause objectionable interference to Station KPEN, San Francisco, and

"(2) To determine, in the light of the foregoing issue whether or not the KTIM-FM application should be granted:"

Appellant alleged that the two stations were 20.8 miles apart, only slightly more than one-half the minimum separation distance for stations two channels removed as required by Section 73.207 of the Commission's Rules. It further alleged that the grant of increased power would cause increased interference to Station KPEN within its 1 mv/m contour. In addition, Appellant alleged that, because of the rough terrain involved, the actual interference caused would be considerably more than that calculated on a theoretical basis. Marin filed an "Opposition to Petition for Reconsideration" on June 14, 1965. (R. 26-30)

In a Memorandum Opinion and Order, released on September 2, 1965, the Commission set aside its original grant of April 30, 1965, but re-granted the application, effective December 2, 1965, under the same terms and conditions. In the Opinion, the Commission conceded that the grant of the Marin application, which would cause additional interference within Pacific's 1 mv/m contour, constituted a modification of Pacific's license. However, it pointed out that KPEN's license expired on December 1, 1965, so that Pacific's ". . . right to demand a hearing because the application works a modification of its license will no longer exist" after that date. (R. 36)

However, the Commission stated that, as indicated by Paragraph 36 of the Fourth Report and Order, it was not its intention to foreclose inquiry into the impact of 1 mv/m interference upon renewal of the interfered-with station's license. (R. 36) It then discussed the merits of Appellant's allegations and concluded that the proposed grant would only cause interference within a small portion of the 1 mv/m contour of Station KPEN. It held that the spot measurements taken by KPEN were not an acceptable substitute for the theoretical computations based on the prediction method specified in the Commission's Rules. It also held that the allegations made by Pacific concerning the uneven and rough terrain were not a basis for setting aside the grant. The Commission then concluded that the fact that Pacific would receive a small amount of interference within its 1 mv/m contour was not an impediment to a grant of the KTIM-FM application. In addition, it found that Pacific had failed to demonstrate any public injury in this interference area, already receiving multiple FM services, resulting from the substitution of the KTIM-FM signal for that of KPEN (R. 36, 37). For these reasons, the Commission concluded, without a hearing, that the public interest would be served by a grant of the application.

On September 10, 1965, Appellant filed an application for renewal of license of Station KPEN. This application was granted on November 5, 1965. (Report No. 5767, November 8, 1965)

STATUTE INVOLVED

The statutes involved in this appeal are the Communications Act of 1934, as amended, and the Administrative Procedure Act. The pertinent provisions thereof are printed in the Appendix to this Brief.

STATEMENT OF POINT

The Commission erred in granting the application of Station KTIM-FM for an increase in power, without a hearing, since such grant constituted a modification of the license of Station KPEN, contrary to the provisions of Section 316 (a) of the Communications Act of 1934, as amended.

SUMMARY OF ARGUMENT

The grant of the KTIM-FM application will cause interference within the 1 mv/m contour of Appellant's station, KPEN. Such action constitutes a modification of license which cannot be legally accomplished without affording Appellant a public hearing. This Court has held that a hearing is required even if the effective date of the modification is postponed until the end of the current term of the station's license. *Transcontinent Television Corp. v. Federal Communications Commission,* 113 U.S. App. D.C. 384, 308 F.2d 339 (1962).

The basic question involved is whether the Commission afforded Appellant the hearing required by law in the rule-making proceeding held in Docket No. 14185. The final report and order in that case makes it clear, however, that the question of granting short-spaced FM applications would be resolved when presented in a specific case. In the instant case, Appellant presented allegations of fact which were not accepted by the Commission. It was entitled, therefore, to an evidentiary hearing with an opportunity to establish facts to show that a modification of its license for the term beginning December 2, 1965, would not be in the public interest. The failure of the Commission to

afford Appellant its right to be heard constitutes an illegal modification of its license contrary to the provisions of Section 316 (a) of the Communications Act of 1934, as amended.

ARGUMENT

The result of a grant of the KTIM-FM application is not in dispute. The Commission has conceded that any increase in the facilities of Station KTIM-FM would cause increased 1 mv/m interference to Station KPEN (R. 36). In addition, the basic principles of law are clear. The Supreme Court, in the KOA case, *Federal Communications Commission v. National Broadcasting Co.*, 319 U.S. 239, 87 L.Ed. 1374 (1943), held that a grant of an application causing interference to an existing station was in fact and substance a modification of that station's license. This Court has reached the same conclusion. *Zenith Radio Corp. v. Federal Communications Commission*, 93 U.S. App. D.C. 284, 211 F.2d 629 (1954); *L. B. Wilson, Inc. v. Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948). These cases make it clear that if the modification occurs during the term of the station's license, a public hearing is required.

This Court has gone one step further and held that before changes can be made in the Commission's Rules that affect the license of a station, even if made effective at the end of the license period, a hearing is required. *Transcontinent Television Corp. v. Federal Communications Commission*, 113 U.S. App. D.C. 384, 388, 308 F.2d 339 (1962). In that case, the Commission instituted a rule-making proceeding to delete Channel 10 from Bakersfield, California. The existing licensee participated fully in the proceeding. The Commission issued a final decision deleting Channel 10 and substituting a UHF channel therefor, making the change effective upon the expiration of the station's current license. Upon appeal, the station contended it was entitled to an evidentiary hearing before the channel could be deleted. The Court first made it clear that the right to a hearing was conceded under the

facts of this case, but said the only issue was what type of hearing was required. *Id.* at 388, 308 F.2d at 343. It then concluded that a rule-making hearing satisfied the requirements of Section 316 (a), even in light of the requirements of Section 307 (d) of the Communications Act of 1934, as amended, (the holdover provision) and Section 9 (b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 USC 1008 (b) (1958), stating:

> "The holdover provision, in other words, has the purpose of permitting continuity of operation while a renewal application is being processed, but this assumes the continued availability of the channel. And continued availability, under the scheme of the Act as a whole, is subject to action of the Commission in a rule making proceeding." *Id.* at 389, 308 F.2d 344.

Thus, the Commission's reliance on *Transcontinent* in the instant case is misplaced. That case stands for the principle that a hearing is required to modify a license, even if the effective date is postponed to the end of the current license term. Thus, if there had been a valid rule-making proceeding changing the Rules so that the increased interference caused by the KTIM-FM grant was no longer recognized, then Appellant would have received the hearing to which it is entitled under Section 316 (a). However, if the rule-making hearing did not decide this issue, Appellant then is entitled to an evidentiary hearing before the license for the term beginning December 2, 1965, can be modified by a grant of the KTIM-FM application.

The issue on appeal, therefore, resolves itself into what the Commission actually did in the rule-making hearing in Docket No. 14185. On July 5, 1961, the Commission issued its original notice discussing the possibility of basic revisions in the FM Broadcast Rules. 21 Pike and Fischer, RR 1655 (1961). In the First and Second Reports, Memorandum Opinions and Orders, the Commission decided to set up an allocation table, as in television, and adopted a schedule of minimum

mileage separations.[1] 23 Pike and Fischer, RR 1801 (1962); 23 Pike and Fischer, RR 1845 (1962). Thereafter, in a Third Report, Memorandum Opinion and Order, the Commission adopted a final Table of Assignments for future FM stations. 23 Pike & Fischer, RR 1859 (1963). In this report the Commission reserved for further rule-making the problem of power increases for existing "short-spaced" stations.

On February 3, 1964, it released a "Third Further Notice of Proposed Rule Making." 29 Fed. Reg. 2385-2386 (1964). In this Notice the Commission proposed to consider and resolve the question of power increases for existing short spaced FM stations. In footnote 5, the Commission stated:

> "5/ The question of power increases for existing short-spaced stations was raised in several petitions for reconsideration of the 'First Report and Order' in this Docket. In the 'Third Report, Memorandum Opinion and Order', we noted specifically that this question was being left open. Therefore, the only rights that short-spaced existing stations may claim under Section 316 of the Communications Act (with respect to each other), are to protection of the 1 mv/m contour—the generally recognized standard prior to institution of proceedings in this Docket. In the event that an existing station would suffer interference within its 1 mv/m contour from a power increase of another existing station (see paragraph 12, *infra*, and Appendix 'B' for methods of prediction), the power increase would be made effective immediately only if (a) the consent of the existing station receiving interference

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[1] Station KPEN is assigned to Channel 267, which uses the frequency 101.3 mc. Station KTIM-FM operates on Channel 265, which uses the frequency 100.9 mc. Thus, the two stations are 400 kc apart which means KTIM-FM is on the second adjacent channel to KPEN. Under the Rules as adopted by the Commission, the minimum separation distance between stations operating on these two channels should be forty miles. (Section 73.207)

> were obtained, or, (b) the license of the interfered-with station had been renewed since the adoption of these proposed rules. In all other cases where interference would be caused within the 1 mv/m contour of an existing station by an increase in the facilities of another existing station, the effective date of the authorization for increased facilities will be postponed until the termination of the current license period for the interfered-with station. At that point, no rights to an adjudicatory hearing under Section 316 of the Communications Act would accrue. *Transcontinent Television Corp. v. F.C.C.*, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962); *The Goodwill Stations, Inc. v. F.C.C.*, ___ U.S. App. D.C. ___, ___ F.2d ___, (Case No. 17498, decided October 31, 1963)."

On October 9, 1964, a Fourth Report and Order was released. In this report the Commission specifically considered and decided to adopt Rules to permit so-called "short-spaced" stations to increase facilities in accordance with an attached table. 3 Pike and Fischer, RR 2d 1571 (1964). In addition, the problem of short-spaced FM stations on second and third adjacent channels (400 and 600 kc/s removed) was considered. It was concluded that the Commission would permit these stations to disregard short-spaced stations on second and third adjacent channels in making requests for increased facilities. *Id.* at 1582.

However, the Commission did not finish its consideration of the second adjacency problem with this conclusion. In Paragraph 36, of the Report, entitled "Legal Considerations" it provided as follows:

> "For reasons stated at length above, we are of the view that the opportunity afforded by the plan adopted herein for increases in facilities and over-all improvement in service is clearly in the public interest, and that the benefits therefrom outweigh the relatively small amounts of interference which will usually result. As mentioned,

> it appears that only in relatively few cases would interference be caused within an existing station's 1 mv/m contour. In the Third Further Notice we tentatively discussed the rights of FM licensees to object to applications for increased facilities by short-spaced stations on the grounds that such proposals would cause interference within their 1 mv/m contours. (See footnote 5, Third Further Notice.) On reflection, we have decided not to attempt to resolve the rights of such objectors at this time. They instead will be resolved if presented in a specific case." *Id.* at 1587. (Underlining supplied)

Thus, the Commission specifically decided not to resolve the legal rights of existing stations but to decide the issues as they were presented in "specific cases." Relying upon this direct and explicit ruling, Appellant did not appeal the Commission's final decision in Docket No. 14185, but relied upon the further hearing proposed by the Commission to resolve its rights in the "specific case" when and if it arose.

The Memorandum Opinion and Order in this case specifically conceded that the rule-making hearing did not determine the rights of Appellant. (R. 35)

> "In Paragraph 36 of the Fourth Report and Order we reserved judgment on the right of an existing licensee to object to such interference. An existing station takes renewal of its license subject to the rules then in effect, and were it not for the statement in Paragraph 36, licensees would not be heard to complain of interference against which they no longer were protected since with the change in the rules such interference no longer constituted a modification of license. *The Goodwill Station v. F.C.C.*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963); see also *Transcontinent Television Corp. v. F.C.C.*, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962)." (Underlining supplied)

The Commission then went on to discuss the merits of Appellant's contentions first raised in the Petition for Reconsideration (R. 36). It determined, without a hearing, the extent of the interference and rejected Appellant's factual contentions that the interference would be greater than usually could be expected. Next, based on these findings of fact, it concluded that the additional interference, standing by itself, posed no impediment to a grant (R. 37). It then reached the final conclusion, which it had declined to reach in the appropriate rule-making hearing, that a Class A short-spaced station such as KTIM-FM, should be permitted to increase power. It regranted the KTIM-FM application, but postponed the effective date of the new grant until December 2, 1965, the day following the expiration of Appellant's license. (R. 37)

It is clear that if the Commission decides to consider a "specific case" and a dispute of fact exists, such a matter can only be resolved after a full hearing. *Hecksher v. Federal Communications Commission*, 102 U.S. App. D.C. 350, 351, 253 F.2d 872, 873 (1958); *L. B. Wilson, supra* at 188, 170 F.2d at 805. Thus, Appellant has clearly been denied its "day in Court."

The Commission has adopted a completely new principle of law. From its original contention that a rule-making hearing allowed it to modify the license of an existing station, providing the effective date was postponed to the end of the current term, it now has decided that no hearing is required to modify a license upon the expiration of the term. It has concluded, as a matter of law, that a licensee has no right in his license once the term expires.[2] It has written off the provisions of Section 307 (d) of the Communications Act and Section 9 (b) of the

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[2] Interesting enough, the Commission takes a contrary position in regard to assignment of licenses. It has held that even after the term of the license has expired, and no renewal granted, the licensee has rights that may be assigned for value. See Brief for Appellee, *James Parr and Darwin Parr v. Federal Communications Commission*, U.S. App. D.C., Nos. 18,981 and 19,004, pp. 26-37.

Administrative Procedure Act. It has ignored the fact that a licensee has a right to file for renewal of his present facilities, and such application cannot be denied without a hearing [Section 309 (e)]. These are rights which this Court stated could not be modified without a hearing. *Transcontinent Television Corp., supra* at 388, 308 F.2d at 343.

Literally, this asserted power means that a licensee can be denied the right to apply for its present facilities. The facilities can be changed or modified by an *ex parte* action of the Commission in granting a new application. The right to a hearing, guaranteed by the Supreme Court, and supposedly recognized by the Commission Rules, ceases to exist if the Commission resorts to the device of postponing the effective date of the grant to the day after the expiration of the existing station's current license.

In this case, the illegal result is self-evident. On November 5, 1965, the Commission renewed the KPEN license for the three year term commencing December 2, 1965. (Report No. 5767, dated November 8, 1965) This clearly is not the same license that Station KPEN had for the period ending December 1, 1965, and for which the licensee applied under the provision of Section 307 (d). This change was made without a hearing and, thus, the modification is directly contrary to the ruling of this Court in *Transcontinent* and *L. B. Wilson*.

CONCLUSION

For the foregoing reasons, Appellant urges this Court to revise the Commission's Order released September 2, 1965, vacate and set aside the grant of a construction permit to Marin Broadcasting Co., Inc. to increase power of Station KTIM-FM and order the Commission to set the KTIM-FM application for hearing and make Appellant a party thereto.

Respectfully submitted,

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December 10, 1965

APPENDIX

STATUTES

Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*:

Section 307(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Section 309(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 316(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safe-

ty of life or property is involved, the Commission may by order provide for a shorter period of notice.

Administrative Procedure Act of 1946, as amended, 5 U.S.C. 1001 *et seq.:*

Section 9 In the exercise of any power or authority-

* * *

(b) Licenses — In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

REGULATIONS

Rules and Regulations of the Federal Communications Commission:

Section 73.207

Minimum mileage separations between co-channel and adjacent-channel stations on commercial channels. — (a) Petitions to amend the Table of Assignments (§ 73.202(b)) (other than those expressly requesting amendment of this

section or § 73.205) will be dismissed and no application for a new station, change in the channel of an existing station, or (except as provided in paragraph (b) of this section) increase in antenna height or effective radiated power, or change in location of an existing station will be accepted for filing unless the proposed facilities will be located at least as far from the transmitter sites of other co-channel and adjacent-channel stations (both existing and proposed) as the distances specified in this paragraph. Proposed stations of the respective classes shown in the left-hand column of the following table shall be located no less than the distance shown from co-channel stations and first adjacent-channel stations (200 kc/s removed) and second and third adjacent-channel stations (400 and 600 kc/s removed) of the classes shown in the remaining columns of the table. The distances shown between stations of different classes apply regardless of which is the proposed station under consideration (e.g., distances shown from a new Class A station to an existing Class C station are also the distances between a new Class C and an existing Class A station). The distances between Class B and Class C stations apply only across zone lines. The adjacent-channel spacings listed also apply: (1) To applications for noncommercial educational facilities on channels 218, 219, or 220, with respect to other stations on channels 221, 222, or 223; (2) to applications for facilities on channels 221, 222, or 223 with respect to non-commercial educational stations on channels 218, 219 or 220 (for classification of noncommercial educational stations, see § 73.504).

Class of Station and Frequency Separation (kc/s)

Class of Station	Class A				Class B				Class C				10-watt educational			
	Co-Ch.	200	400	600	Co-Ch.	200	400	600	Co-Ch.	200	400	600	Co-Ch.	200	400	600
A	65	40	15	15		65	40	40		105	65	65		30	15	15
B					150	105	40	40	170	135	65	65			40	40
C									180	150	65	65			65	65
10-watt educational																

NOTE: Stations or assignments separated in frequency by 10.6 or 10.8 Mc/s (53 or 54 channels) will not be authorized unless they conform to the following separation table:

Class of Stations	Required Spacing in Miles
A to A	5
B to A	10
B to B	15
C to A	20
C to B	25
C to C	30

(b) The zone in which the transmitter of an FM station is located or proposed to be located determines the applicable rules with respect to minimum required spacings.

BRIEF FOR APPELLEE

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ON APPEAL FROM A MEMORANDUM
OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
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Federal Communications Commission
Washington, D. C. 20554

STATEMENT OF QUESTIONS PRESENTED

The questions presented as agreed to by the parties in a stipulation approved by the Court on November 24, 1965 are as follows:

I. Appellant believes the following issue is presented in the above entitled case:

> Whether the action of the Commission in granting the KTIM-FM application without a hearing, and denying Appellant's request that the application be set for hearing, constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act of 1934, as amended.

II. Appellee and Intervenor believe the following issue is presented in the above entitled case:

> Whether the action of the Commission in setting aside its previous grant of the KTIM-FM application, regranting the application effective December 2, 1965, and denying appellant's request for a hearing constitutes an illegal modification of the license of Station KPEN, contrary to the provisions of Section 316 of the Communications Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases and authorities chiefly relied upon are marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE
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BRIEF FOR APPELLEE

COUNTERSTATEMENT AS TO JURISDICTION

This is an appeal from a Memorandum Opinion and Order of the Federal Communications Commission (hereafter the Commission) released on September 2, 1965, (1) setting aside the application of Marin Broadcasting Co., Inc., licensee of station KTIM-FM, San Raphael, California (hereafter KTIM), for a construction permit to increase power, (2) regranting the application effective December 2, 1965, and (3) denying appellant's request to set the application for hearing (R. 34-37). This Court's jurisdiction rests on Section 402(b)(5) of the Communications Act of 1934, 47 U.S.C. 402(b)(5). 1/

1/ Appellant's Notice of Appeal, p. 1, and Brief, p. 2, state that the appeal is taken pursuant to Section 402(b)(6) of the Communications Act, 47 U.S.C. 402(b)(6). Since the only question raised by appellant is whether the Commission modified appellant's license without a hearing, it is suggested that the appeal should be treated as one arising under Section 402(b)(5), 47 U.S.C. 402(b)(5), the only section pertaining to appeals from license modifications.

COUNTERSTATEMENT OF THE CASE

It is believed that a more complete statement of the case than that contained in appellant's brief will be of assistance to the Court.

On July 5, 1961, the Commission issued a Notice of Proposed Rule Making requesting comments on a proposed revision of the FM broadcast rules with respect to the adoption of an allocation system and technical standards, Revision of FM Rules, 21 Pike & Fischer, R.R. 1655 (1961). Thereafter, in its First and Second Reports and Orders, the Commission decided to set up an allocation table, as in television, and to adopt a schedule of minimum mileage separations which would apply in the future between FM transmitter sites, 23 Pike & Fischer, R.R. 1801, 1817, 1831; 23 Pike & Fischer, R.R. 1845 (1962). In a Third Report, Memorandum Opinion and Order, the Commission adopted a final table of assignments for FM stations, but reserved for further rule making the problem of power increases for existing short-spaced FM stations, 23 Pike & Fischer, R.R. 1859 (1963).[2/]

On February 3, 1964, the Commission issued a Third Further Notice of Proposed Rule Making to consider and resolve inter alia, the question of power increases for existing short-spaced FM stations, 29 Fed. Reg. 2385 (1964).[3/] Interested persons were invited to file

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2/ Short-spaced stations were those stations already in existence whose transmitter sites were separated by lesser distances than the minimum mileage spacings adopted in the Commission's First Report and Order. See 47 C.F.R. 73.207 (1965).

3/ On December 21, 1962 the Commission had placed a "freeze" on all applications for changes in FM facilities pending the outcome of the rule making proceedings, 23 Pike & Fischer, R.R. 1855 (1962).

comments[4] and appellant, along with many others, submitted its views as to the proposed rules.[5]

In deciding whether to permit short-spaced FM stations to increase their power, one of the problems which the Commission had to resolve related to the additional interference which such an increase would cause to existing stations.[6] On the one hand many low-powered Class A stations were not, under their existing facilities, providing a satisfactory signal to the areas they were licensed to serve. On the other hand, in some instances an increase in power would cause objectionable interference within the normally protected contour of higher powered Class B and C stations.[7] After carefully weighing these conflicting considerations the Commission resolved the matter in favor of the smaller Class A station.

4/ See 5 U.S.C. 1003, and 47 C.F.R. 1.415.

5/ The record in Docket No. 14185 shows that from its inception appellant participated fully in the rule making proceeding.

6/ Prior to the institution of the proceedings in Docket No. 14185, the generally recognized standard of protection extended to a station's 1 mv/m contour, 29 Fed. Reg. 2385-86 n. 5.

7/ FM stations are divided into three classes: Class A, B, and C. Class A stations are designed to render service to relatively small communities, cities, or towns and the surrounding rural areas. They are limited to 3 kilowatts effective radiated power and antenna height above average terrain of 300 feet, 47 C.F.R. 73.206(a)(2)(3). Class B stations are designed to render service to sizable communities, cities, or towns, or to the principal city or cities of an urbanized area, and to the surrounding area. They are limited to 50 kilowatts effective radiated power and 500 feet antenna height above average terrain, 47 C.F.R. 73.206(b)(2)(3). Class C stations are designed to render service to communities, cities or towns, and large surrounding areas. They are limited to 100 kilowatts radiated area and antenna height above average terrain of 2,000 feet, 47 C.F.R. 73.206(b)(4)(5).

Its Fourth Report and Order, issued on October 9, 1964, concluded that the amount of interference to Class B or C stations would be small and that from a public interest standpoint it was outweighed by the benefits which could be obtained from an improvement in service by the Class A stations, 3 Pike & Fischer, R.R. 2d 1571, 1581-83.

With respect to co-channel and first adjacent stations,[8] the Commission adopted a table which provided specific power limits and antenna heights for short-spaced stations in the different classes, 47 C.F.R. 73.213(a). With respect to Class A stations operating on second and third adjacent channels from the Class B or C station,[9] the Commission adopted the following rule:

> "Stations will be authorized maximum facilities for their class in those directions in which they are short-spaced to other stations on second or third adjacent channels." 47 C.F.R. 73.213(d).[10]

The Commission recognized, however, that the increase in power permitted by the new rules could under some circumstances result in a modification of an existing station's license. It stated:

> "In the Third Further Notice we tentatively discussed

8/ FM channels are spaced at intervals of 200 kc/s. A first adjacent channel is thus one that is 200 kc/s above or below another. See 47 C.F.R. 73.201.

9/ Second and third adjacent channels are 400 and 600 kc/s removed. Here station KTIM-FM operates on Channel 265, which uses the frequency 100.9 mc while appellant is assigned to Channel 267, which uses the frequency 101.3 mc. Hence the two stations are 400 kc/s apart which means that appellant is on the second adjacent channel to KTIM.

10/ Relying upon 47 C.F.R. 73.207, appellant states that the minimum mileage separation between the stations here should be forty miles, Brief, p. 7 n. 1. But the purpose of the Fourth Report and Order was to adopt rules for stations already operating whose transmitter sites were separated by lesser distances than the spacings adopted in the First Report and Order.

> the rights of FM licensees to object to applications for increased facilities by short-spaced stations on the grounds that such proposals would cause interference within their 1 mv/m contours. (See footnote 5, Third Further Notice.) On reflection, we have decided not to attempt to resolve the rights of such objectors at this time. They instead will be resolved if presented in a specific case." 3 Pike & Fischer, R.R. 2d 1587-88.

In footnote five of the Third Further Notice the Commission had stated:

> " * * * the only rights that short-spaced existing stations may claim under Section 316 of the Communications Act (with respect to each other), are to protection of the 1 mv/m contour -- the generally recognized standard prior to institution of proceedings in this Docket. In the event that an existing station would suffer interference within its 1 mv/m contour from a power increase of another existing station * * * the power increase would be made effective immediately only if (a) the consent of the existing station receiving interference were obtained, or, (b) the license of the interfered-with station had been renewed since the adoption of these proposed rules. In all other cases where interference would be caused within the 1 mv/m contour of an existing station by an increase in the facilities of another existing station, the effective date of the authorization for increased facilities will be postponed until termination of the current license period for the interfered-with station. At that point, no rights to an adjudicatory hearing under Section 316 of the Communications Act would accrue. Transcontinent Television Corp. v. F.C.C., 113 U.S. App. D.C. 384, 308 F.2d 339 (1962); The Goodwill Stations, Inc. v. F.C.C., 117 U.S. App. D.C. 64, 325 F.2d 637 (1963)." 29 Fed. Reg. 2385-86 n.5.

On March 18, 1965, KTIM, an existing Class A station, filed an application for a construction permit to increase its effective radiated power in accordance with the new rules (R. 2-12). No objection was filed and, on April 30, 1965, the application was granted (R. 6). Thereafter, on June 1, 1965, appellant, licensee of station KFEN, San Francisco, California, (Class B) filed a petition for reconsideration (R. 17-25). Appellant requested that the

Commission set aside the grant and designate the application for hearing. It alleged that the grant to KTIM would create objectionable interference within the normally protected contour of KPEN and thus constituted a modification of its license. Appellant also alleged that the grant would adversely affect the public interest (R. 20-21).

By Memorandum Opinion and Order released September 2, 1965, the Commission agreed that even though the KTIM application complied with the newly adopted rules, the interference created would result in a modification of KPEN's current license.[11/] Since that license was to expire in a matter of months and on renewal would be subject to the new rules, the Commission set aside its original grant. It then regranted the application to take effect on December 2, 1965, the day following the expiration of appellant's license (R. 37). The Commission ruled that a grant at that time would not constitute a modification of appellant's license (R. 35-36). The Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963); Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962). At the same time appellant's claims that a grant of KTIM's application would not serve the public interest were examined and found without merit.[12/]

11/ "Any station license * * * may be modified by the Commission either for a limited time or for the duration of the term thereof * * *. No such order of modification shall become final until the holder of the license * * * shall have been given reasonable opportunity * * * to show cause by public hearing, if requested, why such order of modification should not issue." 47 U.S.C. 316(a).

12/ The Commission concluded that the grant would only cause interference within a small portion of appellant's 1 mv/m contour; that the alleged spot measurements taken by appellant were not an (cont'd)

On September 2, 1965, appellant filed an application for renewal of its license. This application was granted by the Commission on November 5, 1965 to take effect at 3 a.m. on December 1, 1965.[13] By its terms the renewed license was "(s)ubject to the provisions of the Communications Act * * * and Commission Rules made thereunder * * *." (See Appendix A, p. 1). It was accepted without protest by appellant.

12/ (cont'd) acceptable substitute for theoretical computations based on the prediction method specified in the Commission's rules; that the exceedingly small amount of interference standing by itself was not an impediment to grant of the KTIM application; and that appellant had failed to demonstrate any public injury in this interference area already receiving multiple FM services, resulting from the substitution of the KTIM signal for appellant's (R. 36-37).

13/ Throughout its Brief, appellant mistakenly asserts that the renewal was effective on December 2, 1965. To the contrary, it was effective at 3 a.m. on December 1, and the grant to KTIM was effective at 3 a.m. on December 2.

SUMMARY OF ARGUMENT

1. Section 316(a) of the Communications Act, 47 U.S.C. 316(a), pertains to modifications of licenses which interfere with the rights of a licensee during the term of its license. A change in the Commission's rules which is not effective until the expiration of the current license term does not constitute a license "modification" within the meaning of Section 316(a). Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962); The Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). Here the grant to KTIM was not effective until December 2, 1965, subsequent to the expiration of appellant's license on December 1, 1965. Thus, there was no modification of appellant's license during the three year term of its existence. Furthermore, there was no modification of appellant's renewal because the renewal incorporated the terms of the rule amendments permitting KTIM to increase its facilities. The Goodwill Stations, Inc. v. Federal Communications Commission, supra.

2. The Commission's language in the Fourth Report and Order, 3 Pike & Fischer R.R. 2d 1571, 1587-88(1964) is not a ground for distinguishing the above cases. In the Fourth Report and Order the Commission did not grant each licensee the right

to an evidentiary hearing in addition to the opportunity to be heard in the rule making proceeding. The Fourth Report and Order merely recognized the existence of procedural alternatives for resolving objections in connection with the implementation of the new rules. Here the grant of KTIM's application, effective December 2, 1965, was in accord with the procedural alternatives indicated in the Third Further Notice. Moreover, the Commission considered and rejected as without merit appellant's claims that a grant of KTIM's application would not serve the public interest. Its refusal to set the application for hearing was an act well within its discretion.

3. Appellant's reliance upon the holdover provisions of the Communication Act, 47 U.S.C. 307(d), and the Administrative Procedure Act, 5 U.S.C. 1008(b) is misplaced. Here appellant's renewal took effect immediately upon the expiration of its existing license. There was no time lapse between the two authorizations. In any event the holdover provisions lend no support to appellant's position. When new rules are promulgated which affect an existing licensee's facilities, the right to holdover at the end of the license term does not include the right to apply for the facilities which existed prior to the rule changes, or the right to an evidentiary hearing on the ground that the facilities have been modified in violation of Section 316(a). Transcontinent Television Corp. v. Federal Communications Commission, supra; The Goodwill Stations, Inc. v. Federal Communications Commission, supra.

ARGUMENT

THIS COURT'S DECISIONS IN TRANSCONTINENT AND GOODWILL GOVERN THE DISPOSITION OF THIS APPEAL

Appellant's sole contention on appeal is that the Commission modified its license without a hearing contrary to the provisions of Section 316(a) of the Communications Act, 47 U.S.C. 316(a). As shown below, this argument is foreclosed by this Court's decisions in Transcontinent Television Corporation v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962), and The Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). These decisions construe Section 316(a) "as having reference to a modification which interfers with rights of a licensee during the term of its license." 113 U.S. App. D.C. at 388, 308 F.2d at 343. Both cases hold that rules promulgated in valid rule making proceedings do not modify existing licenses where the rules do not become effective until the expiration of the license term.

1. The Communications Act does not afford licensees permanent protection against interference as a matter of right. Such protection as licensees enjoy stems solely from the Commission's rules which are incorporated in the terms of each license. Federal Communications Commission v. National Broadcasting Co. (KOA) 319 U.S. 239 (1943); Functional Music, Inc.

v. Federal Communications Commission, 107 U.S. App. D.C. 34, 38, 274 F.2d 543, 547, (1958), cert. denied 361 U.S. 813. The continued availability of this protection, under the scheme of the Act as a whole, is subject to such action as the Commission may deem necessary in the public interest. This may occur in the context of an adjudicatory proceeding and result in the modification of an outstanding license, 47 U.S.C. 316(a). Or it may, as here, be brought about by an amendment in the Commission's rules which becomes effective when the current term has expired. Transcontinent Television Corporation v. Federal Communications Commission, supra, 113 U.S. App. D.C. at 387, 308 F.2d at 342; The Goodwill Stations, Inc. v. Federal Communications Commission, supra, 117 U.S. App. D.C. at 68, 325 F.2d at 641.

In Transcontinent the existing licensee of channel 10 (VHF), Bakersfield, California, participated fully in a rule making proceeding designed to substitute a UHF channel for the Bakersfield VHF assignment. The Commission's final decision deleting the VHF channel postponed the effective date thereof until the expiration of the station's current license. On appeal the licensee claimed that the Commission had modified its license without the opportunity for an evidentiary hearing required by Section 316(a). This Court rejected the licensee's contention holding:

> "We construe section 316(a) as having reference to a modification which interferes with rights

> of a licensee during the term of its license. In doing so we bear in mind that we are concerned here only with the type of hearing required, not with the right to a hearing. The latter is conceded. Marietta was heard, though in accordance with rule making procedures. The Commission having considered and decided the deintermixture issue in the rule making proceedings should not be required to cover again the same ground. Cf. Gerico Inv. Co. v. Federal Communications Comm'n, 103 U.S. App. D.C. 141, 143, 255 F.2d 893, 895. We think we would go beyond a reasonable construction of the Act were we to hold that Marietta was entitled to insist upon a different sort of hearing than it was accorded." 113 U.S. App. D.C. at 388, 308 F.2d at 343.

Thus, the hearing afforded by a rule making proceeding was held to be a perfectly proper alternative to the show cause hearing required by Section 316(a), provided the rule amendments were not effective during the term of the license. The same result was reached in this Court's subsequent decision in The Goodwill Stations, Inc. v. Federal Communications Commission, supra. There the Commission instituted a rule making proceeding to explore the possibility of improving and extending radio service in areas of the country that did not receive adequate nighttime service. Appellants (WJR and WGN) participated fully in the proceeding which culminated in an order authorizing additional fulltime stations on the frequencies previously assigned for their individual use. The Commission's decision was not subject to implementation until January 30, 1962, a date subsequent to the expiration of both licenses.

Relying upon the decision in Transcontinent, this Court found without merit the argument that the Commission had modified the licenses in violation of Section 316(a). It held that:

> " * * * the principles of that case [Transcontinent] apply here. The amendments to the rules, made pursuant to procedures valid for rule making purposes, became effective October 30, 1961. The order for the amendments provided that action on applications for the new Class II stations would not be taken until January 30, 1962. The licenses of WJR and WGN expired, respectively, October 1, 1961 and December 1, 1961. Thus, the effectiveness of the amendments insofar as any duplication on the frequencies of WJR and WGN is concerned was not to occur until after the expiration of the licenses of those stations. The fact that the decision amending the rules was made before the expiration of the licenses of WJR and WGN does not alter the situation. The operation of neither WJR nor WGN was subject to any interference or other difference during the life of the licenses of those stations prior to their renewals. The practical effect, and the legal result which we think follows, is that there actually was no modification prior to the expiration of the licenses. These remained with their original integrity for the three year terms of their existence. Nor was there any modification of the licenses after their renewals since the renewed licenses incorporated the terms of the new amendments." (Footnotes omitted.) 117 U.S. App. D.C. at 68, 325 F.2d at 641.

The above cases are dispositive of this appeal. Pursuant to a valid rule making proceeding, in which appellant participated fully, the Commission promulgated rule amendments authorizing power increases for Class A FM stations. When appellant objected to the grant of KTIM's application, the Commission recognized that a grant during the term of appellant's

license would constitute a modification thereof. Accordingly, the Commission set aside its grant and regranted the application to be effective upon the expiration of appellant's license. In this way the license remained with its "original integrity" for the three year term of its existence. Furthermore, as in Goodwill, there was no modification of the license after its renewal on November 5, 1965, since the renewal incorporated the new rule amendments then in effect.

2. In an attempt to distinguish the Transcontinent case - appellant does not discuss Goodwill - a claim is made that the rule making proceeding was invalid. Appellant, however, does not assert that it was denied notice or an opportunity to be heard in that proceeding or that the rules are in any way unlawful. As the sole support for its contention appellant points to a statement by the Commission in its Fourth Report and Order to the effect that rights asserted by objecting stations on grounds of interference would be resolved when they arise and not in the rule making proceeding itself (Brief, p. 9)

Appellant's position is difficult to understand. It appears to be asking this Court to construe the cited language in the Fourth Report and Order as providing for both the opportunity to be heard in the rule making and the right to an adjudicatory hearing before the rules can be implemented. This is

unnecessary as a matter of law, Transcontinent Television Corp. v. Federal Communications Commission, supra and is contrary to the plain meaning and obvious intent of the Commission's statement. Clearly there is nothing in the language relied on which confers any procedural rights above and beyond those already existing under the Communications Act and the Commission's rules. Read in context and with reference to its earlier discussion of the question (footnote 5 of the Third Further Notice[14]), it is apparent that the Commission recognized the existence of procedural alternatives for resolving objections in connection with the implementation of the new rules. Because of the small amount of interference involved the Commission anticipated few such objections, 3 Pike & Fischer, R.R. 2d at 1587. So rather than specificy in advance a procedure for handling such cases the Commission decided to wait until objections were raised and then follow whatever course appeared appropriate.[15]

In addition, the Commission's language indicated a receptivity to study claims that, in a particular case the rule amendments would not serve the public interest and should be waived. Such claims could be presented, as here, when an application for an increase in facilities was filed, or upon renewal of the existing station's license. In either situation, the arguments, like the arguments for waiverof the Commission's rules would be addressed to the Com-

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14/ 3 Pike & Fischer, R.R. 2d at 1587.

15/ As stated in the Third Further Notice, in the event a power increase would cause interference within the 1 mv/m contour of an existing station a grant could be made immediately if the consent of the existing station were obtained or the existing station's license had been renewed subsequent to the adoption of the new rules. Otherwise, the Commission stated, the effective date would be postponed until the termination date of the affected station's license.

(cont'd)

mission's discretion. United States v. Storer Broadcasting Co. 351 U.S. 192 (1956); Williams v. Federal Communications Commission, __ U.S. App. D.C. __, 347 F.2d 479 (1965).

Here, the Commission properly refused to set the KTIM application for hearing. The arguments presented by appellant raised no dispute of fact or public interest question which had not been resolved in the rule making hearing (R. 36-37). Plainly, the Commission did not abuse its discretion in refusing to set these arguments for further hearing. Viewed in this light it becomes apparent that appellant's assertion that a dispute of fact exists, Brief, p. 10, is nothing but an attempt to reargue the merits of the rule making proceeding. As such it has no basis in the Fourth Report and Order.[16/]

3. Finally appellant suggests that the Commission has violated Section 307(d) of the Communications Act, 47 U.S.C. 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).[17/] These provisions, however, are not applicable here

15/ (cont'd) In addition, of course, the Commission would have the option of setting the matter for hearing looking toward modification of the outstanding license, 47 U.S.C. 316(a).

16/ Significantly, the only claim on appeal is that the Commission violated Section 316(a) by modifying appellant's license without a hearing. No attack is made on the reasonableness of the rules. Admittedly, appellant was not bound to appeal from the final order in the rule making proceeding. Examination of the rule amendments would be properly before the Court in Commission action directly applying them, as here, to appellant. Cf. Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 37, 274 F.2d 543, 546-47 (1958), cert. denied 361 U.S. 813. But such examination, as in an appeal from the rule making, would be limited to a determination that the rules were reasonably related to the purposes of the Act and were not arbitrary or capricious. Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 434-35, 236 F.2d 727, 729-30 (1956), cert. denied 352 U.S. 935. No such claim is made on this appeal.

17/ 47 U.S.C. 307(d) provides in part:

> "Pending any hearing and final decision on such an application [for renewal] and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect."

because appellant's renewal was granted on November 5, 1965, to take effect on December 1, 1965, immediately upon the expiration of the old license. In any event the applicability of the holdover provisions was also considered in Transcontinent Television Corp. v. Federal Communications Commission, supra, 113 U.S. App. D.C. at 387, 388-89, 308 F.2d at 343-44, and The Goodwill Stations, Inc. v. Federal Communications Commission, supra, 117 U.S. App. D.C. at 68-69, 325 F.2d at 641-42. In Transcontinent the Court stated:

> "* * * as we have said, Marietta's application for renewal would be for a channel which would no longer be available. The loss of such rights as ordinarily pertain to a renewal application is not a modification of a license when the loss is due to the elimination of the channel in a proceeding valid for the type of Commission action which resulted in the elimination. The right of the Commission in the public interest by rule making to delete a channel under its program of deintermixture must be reconciled in a reasonable manner with whatever rights pertain to a station in Marietta's situation. Such reconciliation permits the Commission to construe a 'modification' which requires a full evidentiary hearing as not including the deletion of a channel effective at the end of the stated term of the existing license. This is a reasonable construction of the Act considering all its various pertinent provisions. The holdover provisions, in other words, have the purpose of permitting continuity of operation while a renewal application is being processed, but this assumes the continued availability of the channel. And continued availability, under the scheme of the Act as a whole, is subject to action of the Commission in a rule making proceeding. There would seem to be no necessity to except a station which is operating upon the channel, when the effective date of the decision is postponed until the end of the license term." 113 U.S. App. D.C. at 389, 308 F.2d at 344.

17/ (cont'd) 5 U.S.C. 1008(b) provides in part:
"In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

This reasoning applies with equal force in the case at bar. Contrary to appellant's contention, the holdover provisions do not give a licensee the right to file for renewal of its present facilities.[18/] Like Section 316(a), Section 307(d) of the Communications Act and Section 9(b) of the Administrative Procedure Act are subject to action of the Commission in a rule making proceeding. In Transcontinent this had the effect of preventing the licensee from applying for renewal of its existing facility in Bakersfield, California. Here, the rule making had the effect of preventing appellant from applying for renewal of its license without the added interference resulting from the rule amendments. In either case the Commission's action did not constitute a "modification" of the station's license based on the right to holdover pending final action upon a renewal application.

18/ This position is not, as appellant contends, Brief, p. 10 n. 2, inconsistent with the position taken in the Commission's brief in the Parr case. There the Commission argued that under the holdover provisions a license could be assigned pending renewal. While this Court did not reach the question -- the appeal was dismissed for lack of standing -- the ability to assign the license had not been impaired by a contrary decision in a rule making proceeding. The Commission's position here is not to the contrary. We argue only that a licensee's right to apply for renewal is subject to the prior action of the Commission in a rule making proceeding. As this Court said: "This is a reasonable construction of the Act considering all its various pertinent provisions." Transcontinent Television Corp. v. Federal Communications Commission, supra, 113 U.S. App. D.C. at 389, 308 F.2d at 344.

CONCLUSION

For the foregoing reasons the order appealed from should be affirmed.

Respectfully submitted,

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

ROBERT D. HADL,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

January 4, 1966

APPENDIX A

FCC FORM NO. 352-A
JUNE 1964

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION LICENSE

File No. BRH-848
Call Letters KPEN

Subject to the provisions of the Communications Act of 1934, subsequent Acts, and Treaties, and Commission Rules made thereunder, and further subject to conditions set forth in this license, 1/ the LICENSEE

PACIFIC FM, INCORPORATED

is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning December 1, (3 a.m., Eastern Standard Time), 19 65 and ending December 1, (3 a.m., Eastern Standard Time), 19 68

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 101.3 megacycles;
   Effective radiated power of 46 kilo watts;
   Antenna height above average terrain of 1220 feet. (hor.); 1180 feet Vertical
2. Transmitter output power 20 kilo watts. horizontal and vertical
3. Hours of operation: Unlimited time.
4. With the station located at:
   San Francisco, California

   Transmitter may be operated by remote control from 1001 California Street, San Francisco, California.

5. With the main studio of the station located at:
   1001 California Street,
   San Francisco, California

The apparatus herein authorized to be used and operated is located at:
San Bruno Peak Estate
San Mateo County, California

North Lat. 37° 41' 24"
West Long. 122° 26' 13"

and is described as follows: Composite, consisting of Standard Electronics Type 935 exciter (with type 936 stereo generator) and two Western Type 506-B-2driver-amplifiers (modified to use Type 3CK10000-A3 electron tubes in final amplifier stages).

(or other transmitter currently listed in the Commission's "Radio Equipment List, Part B, Aural Broadcast Equipment" for the power output herein authorized and, if applicable, for stereophonic and SCA operation).

Antenna System: See Page 2

Obstruction marking specifications in accordance with paragraphs 1, 3, 11 and 21 of FCC Form 715 attached.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

1/ This license consists of this page and pages 1/2.

Dated: November 5, 1965

FEDERAL COMMUNICATIONS COMMISSION,

DEC 23 1965

ma

Ben F. Waple
Secretary

F.C.C. - Washington, D. C.

DESCRIPTION OF ANTENNA SYSTEM:

HORIZONTAL ANTENNA: Custom Built, directional-4. The directional antenna for horizontal polarization is to consist of two bays oriented for maximum radiation in the directions of 35° and 125° true, each bay to consist of 4 horizontal dipoles spaced 360° vertically, each dipole mounted 90° in front of a reflecting screen, the antenna to provide 2° beam tilt.
OVERALL HEIGHT ABOVE GROUND: 250 feet

VERTICAL ANTENNA: Custom vertical radiator, 2 sections. The directional antenna for vertical polarization is to consist of two bays oriented for maximum radiation in the d rections of 35° and 125° true, each bay to consist of 4 vertical dipoles spaced 330° vertically, each dipole mounted approximately 90° in front of two reflector rods spaced 10 inches apart.
OVERALL HEIGHT ABOVE GROUND: 250 feet.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,710

PACIFIC FM, INCORPORATED,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MARIN BROADCASTING CO., INC.,

Intervenor.

APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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January 19, 1966

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Attorneys for Appellant

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TABLE OF CASES

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* Case principally relied upon.

United States Court of Appeals

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APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

I. FURTHER STATEMENT AS TO JURISDICTION

Appellee raises a question whether this appeal should have been taken pursuant to Section 402 (b)(5) of the Communications Act of 1934, as amended, instead of under Section 402 (b)(6). Such a contention is without merit. Section 402 (b)(1) provides that an appeal may be taken "(1) By any applicant for a construction permit . . . , whose application is denied by the Commission." Thereafter, Section 402 (b)(6) specifically provides that appeals may be taken "(6) By any other person

who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described by paragraphs (1), (2), (3), and (4) hereof."

Appellant is appealing from an order granting a construction permit to intervenor which action causes interference to its existing station. This interference made it a party "aggrieved" and one "whose interests were adversely affected." It is in literal and strict compliance with the statutory provisions. On the other hand, Section 402 (b)(5) is intended to cover the situation where the Commission, by order, directly modifies the license of an existing station. No such order was issued in this case.

II. ARGUMENT

The parties are in agreement that the issue in this case is controlled by the principle of law enunciated by this Court in *Transcontinent Television Corporation v. Federal Communications Commission*, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962). The sole disagreement is over the effect of the language of Paragraph 36 of the Fourth Report and Order. In this paragraph, the Commission provided as follows:

> "On reflection, we have decided not to attempt to resolve the rights of such objectors at this time. They instead will be resolved if presented in a specific case. (Underlining supplied.) 3 Pike and Fischer, RR 2d 1571, 1587 (1964).

It is submitted that this means what it clearly says—that the rights of Appellant were not resolved in this proceeding. This is true although it participated in the rule-making.

Appellee states that Appellant contends that the rule-making was invalid. That is not correct. Appellant contends simply that the Commission did not resolve the rights of Appellant, and, therefore, the rule-making hearing cannot constitute the hearing required by this

Court in *Transcontinent*. Nor does Appellant think its demand for an adjudicatory hearing is difficult to understand. The Commission voluntarily refrained from settling the issue of Appellant's rights in the rule-making proceeding. Thus, it is the Commission, itself, who clearly and specifically conferred upon Appellant the right to an adjudicatory hearing.

On Page 15 of its Brief, Appellee presents a new and different interpretation of the language in Paragraph 36. It first says the Commission was recognizing procedural alternatives "for resolving objections." But the language of the Order says that it would not attempt to resolve "rights." In essence, however, Appellee would have this Court read the Order as if Paragraph 36 did not exist. If the Commission had affirmatively adopted the procedure set out in Footnote 5 of the Third Further Notice, it would have legally been able to use the procedure it followed in this case. But since the Order specifically rejected the procedure proposed in Footnote 5, it is obvious that something different is required.

The Appellee's contention in the brief is also contrary to the earlier position of the Commission in the Memorandum Opinion and Order under appeal. There it said: (R. 35)

> "...were it not for the statement in Paragraph 36, licensees would not be heard to complain of interference against which they were no longer protected...." (Underlining supplied.)

Administrative orders, like statutes, should not be given strained and unnatural constructions. *Barron Coop. Creamery v. Wickard*, 140 F.2d 485, 488 (C.C.A. 7th, 1944). The General Counsel of the Commission has come up with a construction in his Brief that is contrary to the plain language of the order, the prior interpretation of the Commission, itself, and is "strained and unnatural" to say the least.

The fact is that a logical reason exists for the language of Paragraph 36. The Commission realized that a few Class A stations were so short spaced that an increase in power would destroy an important part of the service area of a Class B Station. In addition, it realized that if a number of short-spaced Class A stations, all located within the 1 mv/m contour of a Class B station, were allowed to increase power, the over-all loss from the combined grants might cause substantial injury to the Class B station. It obviously proposed to pass on the merits of these individual applications only after examining the specific facts that never had appeared in the record of the rule-making proceeding.

The Commission voluntarily chose to postpone the resolution of Appellant's rights to the time that "they were raised" in a specific case. When Appellant presented the "specific case" the Commission considered the facts on the merits. It disagreed with Appellant's presentation of the facts, but contended it could decide the case on the merits without a hearing. Thus, the procedure suggested by the Appellee's Brief is all stacked against Appellant — it gets a hearing without a decision, and then a decision without a hearing!

The Appellee also contends that the Commission by the language of Paragraph 36 was merely reserving the right to "waive" the new rules if, in the exercise of its discretion, such action was warranted. Paragraph 36 says nothing about a possible "waiver" of the new rules or the intention to resolve "rights" through the use of discretion and without a hearing. It is submitted that the rights referred to were the statutory rights granted licensees by Section 316 (a) of the Communications Act. Such rights can only be resolved by a hearing.

The hard fact is that the Commission did not resolve Appellant's right in the rule-making proceeding. Thus, the instant case is in the same posture as if this important issue had not been mentioned or included in the rule-making proceeding. For this reason, Appellant is

entitled to present the facts of its specific case in an adjudicatory hearing before its license legally can be modified for the period beginning at 3:00 a.m. on December 1, 1965.

III. CONCLUSION

For the reasons herein stated and those in its opening Brief, Pacific FM, Incorporated submits that the Commission's order issued on September 2, 1965, should be reversed and the case remanded to the Commission for further proceeding in accordance with law.

Respectfully submitted,

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